IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 649

WILLIE PEACOCK, ET AL.,
Cross-Petitioners,

versus

THE CITY OF GREENWOOD, MISSISSIPPI,
Cross-Respondent.

ON CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT. (in opposition)

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INDEX.

TABLE OF AUTHORITIES.

TABLE OF AUTHORITIES—(Continued):

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BRIEF FOR RESPONDENT.

I. SPECIFIC EXCEPTIONS TO THE CROSS-PETITION.

In addition to taking issue with the legal contentions of the cross-petitioners which are more fully discussed hereinafter, cross-respondent takes issue with the cross-petition in the following regard, to-wit:

(1) Although the following additional questions are probably included within question number 2 in the

said cross-petition, because cross-petitioners set out narrower questions (numbered 3 and 4) which are also probably included in question 2, cross-respondent, for the sake of clarity, submits two additional questions, to-wit:

(a) Whether it is possible for any of the alleged acts of cross-petitioners to be "under color of authority of" any of the federal statutes or constitutional provisions alleged or any other federal legislation providing for equal rights so as to state a removable case within the meaning of 28 USC Section 1443(a); and (b) Whether the petitions for removal allege sufficient facts as required by 28 USC Section 1446(a) upon which removal jurisdiction could be based under 28 USC Section 1443.

(2) Although Title 28 USC Section 1443 is the primary statute involved, it is not the only one. This case is concerned with 28 USC Section 1446(a), and all of those state statutes (especially in regard to the jurisdiction of the Court under subsection 1 of Section 1443) set out in appendix I of the petition for certiorari filed by cross-respondents in this Court and being cause numbered 471 on the docket; and this cause is also alleged by cross-petitioners in their respective petitions for removal to involve 42 USC Sections 1971 et seq., and 1981 et seq., (especially in regard to the jurisdiction of the Court under subsection 2 of Section 1443).

(3) Respondent takes special exception and strenuously objects to those portions of the cross-petition in which it is stated that the 14 petitioners in the

Peacock case were arrested "while picketing the Leflore County Courthouse" (first sentence on page 2); that they "were *actively* engaged at the time of their arrest in encouraging negro voter registration" and "were peaceably assisting and encouraging negro citizens to register to vote" (page 18 of said cross-petition); and that "prosecution is for an act which they did, i.e., peaceably accompanying Negroes at Greenwood, Mississippi, for the purpose of assisting and encouraging them in the exercise of their right to register and vote" (page 19 of the said cross-petition). There is a total absence in the *Peacock* petitions for removal of any such factual allegations other than that petitioners were "at the time of the arrest engaged in a voter registration drive in Leflore County, Mississippi, assisting negroes to register so as to enable them to vote. . ."

(4) On pages 8 and 9 of the said cross-petition it is submitted the statement of the holding of the court below in the *Peacock* case is misleading. The court below did not hold "that this section does not authorize removal by any person who is prosecuted for an act committed while exercising an equal civil right under the constitution or laws of the United States"; but merely denied cross-petitioners' affirmative contention that Section 1443(2) was so broad. The rule announced by the court below in the *Peacock* case was in no wise contrary to the holding of *New York vs. Galamison*, 342 F. 2d 355, *cert. den.* 380 U.S. 977, 85 S. Ct. 1342, 14 L. Ed. 2d 272 (2 Cir. 1965) as the statement of the holding by cross-petitioners referred to above might lead one to believe.

II. ARGUMENT CONCERNING JURISDICTION UNDER SECTION 1443(1).

Since it is felt that cross-respondent's petition for certiorari covered its contentions regarding Section 1443(1) and since cross-petitioners also ask for an examination by this Court of this portion of the statute (cross-petition at page 11) nothing further will be said here of Section 1443(1), except to reiterate that cross-respondent finds it impossible to understand on what basis a defendant whose equal civil rights are claimed to have been violated by some individual or other acting in dereliction of his duty and in violation of the law in arresting him can assert before trial that he will *therefore* be denied his equal civil rights *by the courts* of the state or will not be able to enforce *in the courts* of the state his equal civil rights. This appears to be a complete non-sequitur; and the holding of the court below that such an allegation entitled a defendant to removal jurisdiction under Section 1443(1) appears patently erroneous.

III. ARGUMENT CONCERNING JURISDICTION UNDER SECTION 1443(2).

A. There Is No Necessity For Review By This Court Of The Decisions Of The Court Below.

Cross-respondent respectfully submits that there is absolutely no need for review of the decisions of the court below regarding Section 1443(2) because even though the complete scope of the statute may be uncertain, its meaning is sufficiently clear to deny these cross-petitioners removal jurisdiction. There is no conflict among any federal courts that removal

jurisdiction under Section 1443(2) does not extend to cases such as presented here, nor can the law be regarded as unsettled in this regard.

Three different United States Court of Appeals have decided this issue and each of them decided contrary to cross-petitioners. *New York vs. Galamison, supra,* held:

> "(4) When the removal statute speaks of 'color of authority derived from' a law providing for equal rights, it refers to a situation where the lawmakers manifested an affirmative intention that a beneficiary of such a law should be able to do something and not merely to one where he may have a valid defense or be entitled to have civil or criminal liability imposed on those interfering with him."

City of Chester vs. Anderson, et al., 347 Fed. 2d 823 (3rd Cir. 1965) quoting *Galamison, supra,* held:

> "A private person claiming the benefit of Section 1443(2) . . . must point to some law that directs or encourages him to act in a certain manner, not merely to a generalized constitutional provision that will give him a defense or to an equally general statute that may impose civil or criminal liability on persons interfering with him."

The United States Court of Appeals for the Fifth Circuit holding against the cross-petitioners in the case at bar decided the question expressly avoided in *Galamison,* i.e., that Section 1443(2) is limited to federal officers and those assisting them or other-

wise acting in an official or quasi-official capacity and does not pertain to private citizens simply exercising equal civil rights. Cross-respondent reads the *Peacock* opinion as adopting the *Galamison* rule that a person claiming the benefit of Section 1443(2) must point to a federal law that directs him to act as he did; but that, additionally, such person must also have acted in some way on behalf of government.

Cross-respondent therefore respectfully submits that, even though this Court has never expressly construed Section 1443(2), since there is no conflict among any of the federal courts construing Section 1443(2) (in addition to the above three United States Court of Appeals cases, see also *State of Arkansas vs. Howard*, 218 Fed. Sup. 626 (Arkansas, 1963); and *Michigan vs. Barnard*, 239 Fed. Sup. 306, (E.D. Mich. 1965); and since under any construction adopted by any of the above courts cross-respondents would be denied removal jurisdiction, there appears no necessity for review of the decisions of the court below in this case regarding 1443(2).

B. There Is No Substantial Federal Question Presented For Review.

This case presents a question of importance concerning Section 1443(2) only if the contentions of cross-petitioners are meritorious. Cross-respondent, however, submits that there is so little merit in the contentions of cross-petitioners as not to present any substantial federal question for this court to review.

Cross-respondent does not deny the contention of cross-petitioners that the equal protection clause of the 14th amendment and the general civil rights statutes are "laws providing for equal rights"; but cross-respondent contends, as the court held in *Galamison*, that these laws do not confer "color of authority" and that, in any case, cross-petitioners did not allege the possession of the requisite capacity to invoke the jurisdiction conferred by the statute, i.e., they had no quasi-official status. Regarding the requirement of such a status, cross-respondent submits that the following reasoning of the *Galamison* opinion is persuasive:

> "One begins with the troubling question why if 'other person' in fact meant 'any person', Congress did not simply repeat in the second or 'authority' clause of § 3 of the Act of 1866 and §641 of the Revised Statutes, these words which it had already used in the first or 'denial' clause. Next, since the first clause was directed only toward freemen's rights, symmetry would suggest that the second clause concerned only acts of enforcement. 'Arrest or imprisonment, trespasses, or wrongs', were precisely the probable charges against enforcement officers and those assisting them; and a statute speaking of such acts 'done or committed by virtue of or under color of authority derived from' specified laws reads far more readily on persons engaged in some sort of enforcement than on those whose rights were being enforced, as to whom words like 'acts founded upon' would have been much more appropriate. The inclusion of 'or other person' can readily be explained without going so far as ap-

pellants urge. In anticipation of massive local resistance Congress devoted §§ 4-10 of the Civil Rights Act of 1866 to provisions compelling and facilitating the arrest and prosecution of violators of § 2, the criminal sanction for §1 rights. These sections authorized and required district attorneys to prosecute under § 2, fined marshals who declined to serve warrants, authorized federal commissioners to 'appoint, in writing. . . any one or more suitable persons, from time to time' to serve warrants, empowered the persons so appointed 'to summon and call to their aid the bystanders or possee comitatus of the proper county, or such portion of the . . . . forces of the United States' as was needed, and made interference with warrant service a further federal crime. Although the 'one or more suitable persons' might be deemed 'officers' the bystanders and the posse comitatus were not, and were surely among those covered by 'other persons'. The argument for a limited construction of 'other person' in the 'authority' clause is aided by the consideration that the 1866 Act conferred original jurisdiction only for the 'denial' category. The freedmen would need that resource, whereas officers and persons acting under or in aid of them normally would not. Finally, the derivation of §3 of the 1866 Act from §5 of the Habeas Corpus Act of 1866, see fn. 5, argues against appellants' broad construction. The 'any other person' in the 1863 act was someone who had been deputized by the President or by Congress to do something, not a person asserting his own rights. It is rather

logical to assume that Congress had the same kind of 'person' in mind when it used the same phrase in the Civil Rights Act of 1866 and repeated it in § 641 of the Revised Statutes."

And this is the same reasoning adopted by the Court below (pages 685-6 of 347 Fed. 2d 679) in holding against cross-petitioners.

Regarding whether any of the general civil rights statutes or any statute alleged in the petitions for removal or the equal protection clause of the federal constitution confer any authority or can confer 'color of authority', the argument that seems to cross-respondent to settle the issue is simply that this phrase has never been considered in any context to have meant what cross-petitioners contend and such a construction has even been rejected in relation to a statute from which Section 1443(2) was derived. See *Bigelow vs. Forrest*, 76 U.S. (9 Wall.) 339, 348-49 (1869) and the statement of the *Galamison* court to this effect, to-wit:

> "A Court much closer to the Reconstruction legislation than we are, Bigelow v. Forrest, 76 U.S. (9 Wall.), 339, 348-49 (1869), applying the removal provision of the Habeas Corpus Act of 1863, see fn. 5, decided squarely that even when there was a specific statute or presidential order, not every act deriving its foundation therefrom was 'under color of authority' of the statute or order for removal purposes."

And as further pointed out in *Galamison:*

> "We gain a valuable insight into the meaning of 'color of authority' if we reflect on the cases

at which §1443(2) was primarily aimed and to which it indubitably applies—acts of officers or quasi-officers. The officer granted removal under §3 of the Civil Rights Act of 1866 and its predecessor, §5 of the Habeas Corpus Act of 1863, would not have been relying on a general constitutional guarantee but on a specific statute or order telling him to act. Cf. Hodgson v. Millward, 12 Fed. Cas. 568 (No. 6) (C. C. Pa. 1863), approved in Braun v. Sauerwein, 77 U. S. (10 Wall.) 218, 224 (1869). A private person claiming the benefit of §1443(2) can stand no better; he must point to some law that directs or encourages him to act in a certain manner, not merely to a generalized constitutional provision that will give him a defense or to an equally general statute that may impose civil or criminal liability on persons interfering with him."

C. Conclusion Of Argument Concerning Jurisdiction Under Section 1443(2).

Cross-respondent submits that there is simply so little merit to the arguments of cross-petitioners regarding Section 1443(2) as not to constitute a substantial federal question because even though the statute is ambiguous, it is clear that it cannot apply to cross-petitioners, and this exclusionary construction has been adopted by every federal court given an opportunity of ruling on this issue and on related issues.

IV. SUFFICIENCY OF FACTUAL ALLEGATIONS REQUIRED BY SECTION 1446(a).

The Court below held only that the allegations of the petitions for removal involved in this case were sufficient under Section 1443(1), but that court did not decide that they were sufficient under Section 1443(2). That they clearly are not is indicated by the fact that the cross-petitioners in discussing the *Peacock* case in the said cross-petition in order to make an intelligible argument felt compelled to supply facts which nowhere appear in the petitions for removal (See page 2 of this brief). Nowhere in the petitions for removal can one ascertain what act or acts cross-petitioners claim they were committing at the time of their arrest, or by whom they were arrested, or any circumstances whatever concerning their arrest, or what act or acts they claim were done "under color of authority". The petitions for removal are simply devoid of any specific factual allegations.

Cross-respondent submits that the effect of the holding of the Court below regarding the sufficiency of factual allegations to invoke Section 1443(1) jurisdiction and the effect of this Court holding that the factual allegations are sufficient to invoke Section 1443(2) jurisdiction, will be to deny the cross-respondent, and all such local communities, a very substantial and valuable right, to-wit: The right to test the legal sufficiency of a petition for removal by motion to remand addressed to the face of the said petition. That this is a right cannot be doubted in view of the requirement of "a short and plain statement of the facts" by 28 USC Section 1446(a); and it

is submitted that it is a right which can hardly be said to impose a burden on a defendant attempting removal, but the loss of which will prove unreasonably expensive and burdensome to cross-respondent. (The Federal District Court for this division is approximately 57 miles distant and if the Court below is sustained and if cross-petitioners' contention is upheld regarding the factual sufficiency of these petitions for removal, cross-respondent would have to appear in the federal district court with all of its witnesses ready for an evidentiary hearing in order to contest for the first time a defendant's right to remove). This right to contest the legal sufficiency of a petition for removal was clearly recognized by this Court in *Chesapeake & Ohio R.R. Company vs. Cockrell*, 232 U.S. 146, 34 Sup. Ct. 278, 58 L. Ed. 544 (1914) wherein it was said:

> "The right of removal from a state to a Federal Court, as is well understood, exists only in certain enumerated classes of cases. To the exercise of the right, therefore, it is essential that the case be shown to be within one of those classes; and this must be done by a certified petition setting forth, agreeably to the ordinary rules of pleading, the particular facts, not already appearing, out of which the right arises. It is not enough to allege in terms that the case is removable or belongs to one of the enumerated classes, or otherwise to rest the right upon mere legal conclusions. *As in other pleadings, there must be a statement of the facts relied upon, and not otherwise appearing in order that the Court may draw the proper conclusion from all the facts, and that . . .*

the opposing party may take issue by a motion to remand, with what is alleged in the petition." (Emphasis supplied.)

V. CONCLUSION.

Cross-respondent agrees with cross-petitioners, and respectfully submits unto this Court, that a writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit regarding its construction of Section 1443(1); but, as pointed out in its petition for certiorari, cross-respondent contends that the construction placed on Section 1443(1) by this Court in that line of cases culminating in *Kentucky vs. Powers*, 201 U.S. 1, 50 L. Ed. 633, 5 Ann. Cas. 705 (1906) was and is correct and that there is no reasonable basis on which this Court could overrule its prior decisions in these cases. Cross-respondent therefore submits that the prayer of said cross-petition concerning Section 1443(1) should be denied.

Cross-respondent also respectfully submits that this Honorable Court should deny the cross-petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit holding that cross-petitioners are entitled on the face of the petitions for removal to invoke federal removal jurisdiction under Section 1443(2) for the following reasons, to-wit:

1. The construction of Section 1443(2) has been settled by the lower federal courts (at least so far as

these cross-petitioners are concerned) so that there is no need for review by this Court; and

2. There is no substantial federal question involved in this case because (a) the petitions for removal do not allege sufficient facts as required by Section 1446(a) to raise a jurisdictional question under Section 1443 and (b) the contentions of the cross-petitioners are without serious merit.

Respectfully submitted,

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CERTIFICATE.

The undersigned counsel of record for the cross-respondent, The City of Greenwood, Mississippi, hereby certifies that a true copy of the foregoing petition has been this day forwarded by United States mail, postage prepaid, to Benjamin E. Smith and Jack Peebles of Smith, Waltzer, Jones & Peebles, 1006 Baronne Building, New Orleans, Louisiana, attorneys of record for cross-petitioners.

This the . . . . day of December, 1965.

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